SIVANENDRAN V. MARKANDOO & ANOR.

v.

DR. MAHENDRAN V. MARKANDOO

SUPREME COURT, KUALA LUMPUR
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPEAL NO. 429 OF 1986]
24 MARCH 1988

SUCCESSION: *Probate - Injunction - Probate action - Respondent applied for interlocutory injunction against Administrator/Administratrix of his deceased father's estate, appointment of Receiver and other ancillary relief - Test adopted by Judge as propounded in 'American Cyanamid' - Whether Judge exercised judicial discretion based on wrong principle - Test valid in ordinary civil proceedings - Whether higher test required in probate action - Strong prima facie case required to grant interlocutory injunction against Administrator/ Administratrix - Requirement of some evidence of actual misconduct or fraud and immediate danger of loss - Probate action - Order 71, 72 Rules of the High Court 1980 - Probate action - Order 71, 72 of the Rules of the High Court 1980.*

The respondent in this appeal after taking out a writ in December 1985 against the appellants applied by a Summons for an interlocutory injunction against the administrator and administratrix of his deceased father's estate, appointment of a Receiver and other ancillary relief.

The learned Judge in granting the interlocutory injunction, adopted the test propounded by Lord Diplock in the *American Cyanamid* case. Hence, this appeal by the appellants.

Held:

[1] A strong *prima facie* case is required to induce a Court to grant an interlocutory injunction against an administrator or administratrix and thereby displacing his/her authority. The Court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances and there must be some evidence of actual misconduct or fraud and immediate danger of loss.

[2] Applying this higher standard of test to the facts of this case, it is plain that the learned Judge had exercised her judicial discretion based on wrong principle.

[3] Having carefully read and considered the affidavits filed herein by the respective parties to the proceedings, no *prima facie* case had been made out against the appellants.

[4] The appeal was therefore allowed, the interlocutory injunction and the appointment of a receiver made by the learned Judge on 29 September 1986 set aside and an early trial of the action was instead ordered.

[Appeal allowed with costs of appeal only. Deposit ordered to be refunded to appellants. Order of early trial of action.]

Case referred to:
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396

Legislation referred to:
Rules of the High Court 1980, O. 71, O. 72

For the appellants - G. Sri Ram (S. Kanawagi with him); M/s. Khana & Co.
For the respondent - Y.M. Raja Aziz Addruse (Dennis Appaduray with him); M/s. Sidek, Zubir, Sulaiman, Nadzir & Partners

JUDGMENT

George Seah SCJ:

For the purpose of this appeal we would regard the writ taken out by the plaintiff, Dr. Mahendran a/l V. Markandoo (the respondent herein) as probate action albeit the procedure laid down in O. 72 of the Rules of the High Court 1980 has not been complied with. We would like to emphasize that probate actions whether contentious or non-contentious, should comply with O. 71 and 72 of the Rules of the High Court 1980.

After issuing the writ in December 1985 the respondent took out a summons in May 1986 applying for an interlocutory injunction against the administrator and administratrix of his deceased father's estate, appointment of a receiver and other ancillary relief. The learned Judge made the order in terms.

In granting the interlocutory injunction the learned Judge adopted the test propounded by Lord Diplock in the *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 that the pleadings have raised a number of serious questions to be tried. Whilst this test may be valid in ordinary civil proceedings it is submitted by learned Counsel for the administrator and administratrix (hereinafter referred to as the appellants) that it is not a proper test to be adopted in probate actions, in as much as the administrator and/or administratrix is appointed by the Court and subject to the control of the Court. He argues that a higher test ought to be used. Learned Counsel for the respondent seems to agree with this submission. In our judgment, a strong *prima facie* case is required to induce a Court to grant an interlocutory injunction against an administrator or administratrix and thereby displacing his/her authority. There must be some evidence of actual misconduct or fraud and immediate danger of loss. For the Court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances.

Applying this higher standard of test to the facts of this case it is plain that the learned Judge had exercised her judicial discretion based on wrong principle. Learned Counsel for the respondent had contended that although the learned Judge had not applied the test correctly there was nevertheless ample affidavit evidence to support that a strong *prima facie* case had been made out against the appellants and that the learned Judge was quite justified in granting the interlocutory injunction and appointing a receiver to manage the estate of the deceased. This contention was disputed by learned Counsel for the appellants.

We have carefully read and considered the affidavits filed herein by the respective parties to these proceedings. We are unable to agree with the submission of learned Counsel for the respondent that a strong *prima facie* case had been made out against the appellants. True, there were a number of allegations of mismanagement and other acts of improprietary made by the respondent but they were strongly denied by the appellants. On the other hand, there was the claim of the appellants that the administration of the deceased's estate had already been completed some years ago in November 1979.

For the above reasons, we allow the appeal and set aside the interlocutory injunction and the appointment of a receiver made by the learned Judge on 29 September 1986, and order an early trial of this action instead. We would award to the appellants costs in this Court only to be taxed. The deposit shall be refunded to the appellants.

Also found at [1988] 1 CLJ 480